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## **NEW POINTS IN THE CIVIL CODE 2015 AND RECOMMENDATIONS ON IMPROVEMENTS OF RELATED LEGAL DOCUMENTS**

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The Civil Code was passed by the 13th Legislature of the National Assembly at its 10th Session on November 24, 2015, which shall take effect as of January 01, 2017. The Civil Code 2015 consists of 6 parts, 27 chapters, 689 articles, with many new contents and reflecting key changes in legal thinking, in establishment of a uniformed and consistent legal mechanism for governing civil relations, for defining legal status, legal standards for the conduct of individuals and legal persons in civil life; better recognizing and protecting personal and property rights and obligations of people. As such, in the relation to the Civil Code 2015, provisions of some existing legal normative documents are not in consistency or conformity with the provisions of the new Civil Code. There are still some legal gaps in governing specific civil relations according to the light of the new Civil Code 2015.

This paper only focuses on major admendments and supplements of the Civil Code 2015, which have impacts on other related legal normative documents and presents recommendations on improvements of these LNDs as well as the application of civil law in practice in general.

### **1. REGARDING ISSUES THAT NEED THE CONSISTENCY AND CONFORMITY IN GOVERNING CIVIL RELATIONS**

#### **1.1. Regarding the application of the Civil Code**

Concerning the basic principles of the civil law, the Civil Code 2015 confirms that other related laws governing civil relations must not be contrary to the basic principles of the civil law prescribed in the Artcle 3 of the Civil Code. As such, re-formulation of the basic principles of the civil law is not necessary or if it is the casae, they must not be contrary to the provisions of the Civil Code.

Example:

The Commercial Law 2005, in Section 2, Chapter 1 (from article 10 to article 15), on basic principles in commercial activities, specify the basic principles of the Civil Code 2015 but not in a sufficient manner (failure to specify principles of goodwill and honesty, principle of not infringing rights and interests of other subjects, principle of being self-liable for one's civil acts). On the other hand, contents of some principles are not aligned with provisions of the Civil Code 2015. For example, Article 11 of the Commercial Law provides that: "Parties have the rights of freedom to reach agreements *not in contravention of the provisions of law, fine traditions and customs and social ethics ...*" while the Civil Code 2015 no longer prescribes that law compliance is the basic principle of civil law as in the Civil Code 2005, and it only sets the limit to the purpose and content of transactions which "*must not violate provisions of law*" or must not be contrary to social ethics.

Similarly, Clause 1 Article 4 of Law of Real Estate Business 2014 says that one of principles of real estate business is "*in contravention of the provisions of law*"

Concerning relations between the Civil Code and other related laws, on the one hand, the Civil Code 2015 sets out the general standard conduct in civil relations and on the other hand, to be aligned with the purpose of governing special civil relations, the Civil Code refers to some other related laws in some specific provisions. In case where other related laws do not include or include certain provisions but they violate the basic principles of the civil law, the provisions of the Civil Code shall prevail. Therefore, related laws should be reviewed, studied, amended, supplemented to ensure the consistency in improvement and application of the law to govern special civil relations.

### **Recommendations:**

- Based on the provisions of the Civil Code 2015 and the Law on Promulgation of LNDs 2015, other related laws should not re-formulate the basic principles of the civil law which are already prescribed by the Civil Code 2015. They should only prescribe special principles in establishment, implementation and termination of specific civil relations.

### **1.2. Regarding recognition, respect, protection and guarantee of civil rights.**

The Civil Code 2015 prescribes that all civil rights of individuals, legal persons *may only be limited according to the law* in exceptional circumstances due to national defense and security, social safety, social ethics and the community's health; individuals and legal persons shall exercise their civil rights according to their own will; that individuals, legal persons do not exercise their civil rights does not mean the ground for termination of their rights, *unless otherwise prescribed by the law*.

In specific institution, the Civil Code 2015 also includes amended and supplemented provisions relating to the exercise and protection of civil rights towards minimizing changes, termination of civil rights" *as prescribed by law*"<sup>1</sup> but not

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<sup>1</sup> Clause 2 Article 9, Article 13, Clause 2 Article 14, Article 18, Article 25, clause 3 Article 31, point c clause 4 Article 33, Clause 2 Article 34, clause 3 Article 36, clause 2, clause 3 Article 38, Article 74, clause 2, clause 3 Article 87, clause 2 Article 101, point c clause 1 Article 117, clause 2 Article 117, clause 1 Article 149, Article 158, Article 160, clause 1 Article 161, Article 162, clause 2 Article 214, clause 1 Article 219, clause 4 Article

“*according to law*” as prescribed by the Civil Code 2005. Examples include:

- Civil legal capacity of individuals, legal persons shall not be restricted, unless otherwise prescribed by civil law or other related laws;

- All individuals, legal persons shall have the right to establish legal persons, unless otherwise prescribed by law;

- The purpose and contents of the transaction must not violate prohibitory provisions of law and or be contrary to social ethics;

- The forms of civil transactions shall be the conditions for such transactions to be valide in cases where it is so provided for by law.

- The forms of civil transactions shall be the conditions for its effectiveness in cases where it is so provided for by law. In cases where it is prescribed by law that a civil transaction must be expressed a written form which is notarized, authenticated, registered, such provisions must be complied with.

- The statute of limitation is the time limit prescribed by law;

- Ownership rights comprise an owner’s rights to possession, to use and to disposition of his/her property as prescribed by law.

- Ownership rights and other rights to property shall be established and exercised if they are prescribed in the Civil Code and relevant laws. Other rights to property shall remain valid in case the ownership right has been transferred, unless otherwise provided by this Code or relevant laws;

- Each holder of other rights to property is entitled to perform all acts within the scope prescribed in this Code and relevant laws but they must not cause damage or adversely affects state, national, public interests, rights and legitimate interests of the owner of property or of other people;

- The time of establishing the ownership rights and other property-related rights shall be determined as prescribed in this Code and relevant laws; in the absence of relevant provisions of law, the agreement of the parties shall be applied; if there are neither relevant provisions of law nor agreements of the parties, the time of establishing ownership rights and other property-related rights shall be the time when the property is transferred;

- Usufruct right, surface right are established as prescribed by law, according to agreement or will; take effect to every individuals, legal persons unless otherwise prescribed by other relevant laws;

- Security measures shall be registered according to agreement or as prescribed by law . The registration shall only be the condition for a secured transaction become valid if it is so prescribed by law.

- Where an offeror has not specified the time-limit, the offer to enter into a

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220, clause 8 Article 221, point b clause 3 Article 225, Article 236, clause 8 Article 237, Article 246, Article 247, clause 2 Article 278, clause 4 Article 312, clause 1 Article 320, clause 5 Article 321, clause 6 Article 323, Article 360, clause 1 Article 372, point b clause 1 Article 388, clause 7 Article 422, Article 431, clause 1 Article 459, clause 3 Article 465, clause 4 Article 466, clause 1 Article 468, clause 2 Article 470, clause 1 Article 473, Article 514, clause 2 Article 570, clause 1 Article 573, Article 584, Article 598, point b clause 1 Article 630...

contract is effective as from the time the offeree receives the offer, unless otherwise prescribed by laws.

- One party may cancel the contract in case it is prescribed by law;
- The property prescribed in this Code may be the subject of a sale contract. If a property is banned or restricted from transfer as prescribed by laws, it shall become a subject of a sale contract if it complies with the regulations of such laws.
- The donation of immovable property must be recorded in written form which must be notarized, certified, or registered if such immovable property must be registered as prescribed by law;
- The rate of interest for a loan shall be agreed by the parties. In case the parties agree on the loan interest, such interest rate must not exceed 20% of the loan per year, unless otherwise prescribed by law. According to actual conditions and at the proposal of the Government, the Standing Committee of National Assembly shall adjust the above interest rate and send report to the National Assembly at the latest session.
- The subject of a service contract must be the work which is likely implemented, not prohibited by law or not contrary to social ethics;
- Anyone that intentionally or unintentionally commits the act of infringing upon the life, health, honor, dignity, reputation, property, or other legal rights or interests of a person, must compensate for such damage, unless otherwise prescribed in this Code or relevant laws;
- Those who cause a damage shall be discharged from the liability for compensation in case where the damage incurs due to force majeure events or at entire fault of the aggrieved person, unless otherwise agreed or otherwise prescribed by law....

However, some existing legal normative documents were formulated on the basis of the elaboration of the provisions of the Civil Code 2005, they do not comply with the provisions on the restrictions on civil rights of the Civil Code 2015, therefore, they need to be studied, amended and supplemented.

Examples:

- Clause 2 Article 31 Decree No. 87/2009/NĐ-CP on October 19, 2009 about multi-modal transportation sets out the statute of limitations as follows: "The time limit for complaints shall be agreed by the two parties in the multimodal transport contract. If no agreement is reached, the time limit for complaints is 90 days from the date the goods is completely delivered to the consignee under Clause 3, Article 20 of this Decree, or after the date on which the goods should have been delivered under the multimodal transport contract, or after the date specified at Point b. Clause 1, Article 21 of this Decree."

- Clause 1, Clause 2, Article 6 Decree No. 37/2015/NĐ-CP on April 22, 2015 detailing construction contracts provides that:

1. A construction contract shall become legally effective when it meets the following conditions:

a) Persons who participate in signing a contract must obtain adequate legal capacity;

b) Meet the principles for contract signing as prescribed in Article 4 hereof;

c) Form of a contract is in writing and signed by representative of the parties to a contract according to the law. In case either of the parties is an organization, such party shall sign its name and affix stamp according to the law.

2. The effective date of a contract is the date when it has been signed (affixed with stamp if any) or other specific times as agreed in the contract and the employer has received performance bond issued by the contractor (for a contract with provisions on performance bond being specified).

- Points d, đ, e Clause 2 Article 11 Decree No.167/2013/ND-CP on November 12, 2013 on sanctions against administrative violations of social security, order and safety, prevention and fighting of social evils, fire and domestic violence provide for sanctions against those who commit of the following acts: “d) pledge of property without such ownership document to which ownership document must be enclosed as prescribed by law; đ) accept any pledge of property without a contract as regulated; e) accept pledge of property owned by other person without eligible authorization of the owner to the property pledgor.”. As such, the Decree 167/2013/ND-CP approaches the pledging relations from the perspective of administrative management and imposes sanctions against transactions in which the pledgee cannot show any evidence to prove that the pledged property is legally owned by or under the management of the pledgor. This is not in line with new light of Civil Code 2015 and other relevant normative documents guiding secured transactions, whereby, these documents only see the above-mentioned as ground for consideration of conditions on the validity of the transactions but not violations of social order, security.

- Article 24 of the Commercial Law 2005 prescribes: “those sale contracts which are required by provisions of law to be established in written form, such provisions must be complied with”....

### **Recommendations :**

Ministries and agencies need to review to amend, supplement or recommend amendments, supplements or promulgation of new LNDs governing relations falling under their specialized fields to be consistent with the principle on restrictions, changes, termination of civil rights as “prescribed by law” but not just “according to law”

## **2. WITH REGARD TO NEW PROVISIONS OR AMENDED, SUPPLEMENTED PROVISIONS OF THE CIVIL CODE 2015 WHICH NEED TO BE FURTHER ELABORATED IN RELATED LEGAL NORMATIVE DOCUMENTS**

**2.1. Regarding new provisions of the Civil Code 2015 of which the implementation requires promulgation of new legal normative documents**

### ***2.1.1. Registration of property***

Art. 106 of the Code prescribes:

1. Ownership and *other rights to immovable property* shall be registered in accordance with this Code and law on registration of property.

2. Ownership and *other rights to movable property* shall not be required to be registered, unless otherwise prescribed by law.

3. *The registration of property must be public.*

So, in addition to the ownership, the Code also prescribes the registration of “other rights to property”. At the same time, the prescription of the registration of property of the Civil Code is generally aimed at securing the effectiveness against the third party. For example:

- Art. 133 of the Civil Code provides that

In cases where a civil transaction is invalid but the transacted property is registered at a competent authority and such property has already been transferred to a bona fide third party through another transaction which is established according to that registration, such transaction shall remain valid. In cases where a civil transaction is invalid but the transacted property is registered at a competent authority and such property has already been transferred to a bona fide third party through another transaction which is established according to that registration, such transaction shall remain valid. In cases where the transacted property which is required to be registered has not registered at a competent authority, the transaction with the third party shall be invalid, except for cases the bona fide third party received such property through an auction or a transaction with an another party being the owner of such property pursuant to a judgment or decision of a competent authority but thereafter such person is not the owner of the property as a result of the judgment or decision being amended or annulled.

Art. 297 of the Civil Code prescribes:

“1. Security shall take effect against a third party from the time of registration of such security or the secured party keeps or possess the collateral.”

Clause 2 of Art. 298 of the Civil Code specifies: “A registered security shall take effect against third party from the time of registration.”

Clause 2 of Art. 210 of the Civil Code prescribes: “If an immovable property is the subject of pledge as prescribed in law, the pledge on immovable property shall take effect against third party from the time of registration..”

Clause 2 of Art. 210 of the Civil Code prescribes: “The mortgage of property shall take effect against third party from the time of registration”

### **Recommendations:**

In order to ensure that the Civil Code is centrally implemented in a consistent and timely manner nationwide as of January 01, 2017, the Government, the SPP, SPC should “*review related legal normative documents to make their own proposals or request competent authorities to annul, amend, supplement provisions of the new Civil Code (revised) in a timely manner*”, submit to the NA for consideration of the *Law on Registration of Property*” as the requirements set out in the Resolution No. 111/2015/QH13 dated November 27, 2015 of the NA on prevention and control of

violations of laws and crimes.

In addition, the Resolution No. 01/NQ-CP dated January 07, 2016 of the government on main tasks of, resolutions to guiding the implementation of the economic – social development plan and estimated budget 2016 clearly indicates that one of the tasks creating favorable conditions to promote production and business activities is *“the MOJ shall take lead and cooperate with the Ministry of Natural Resources and Environment and other ministries and central agencies... to formulate the Law on Registration of Property”*. The Decision No. 243/2016/QĐ-TTg dated February 05, 2016 of the PM issuing the Plan on the implementation of the Civil Code sets out the tasks of the MOJ *“to take lead, cooperate with the SPC, SPP and other related ministries, agencies to study, request for the formulation of legal normative documents on the registration of property...”*

The registration of property has been prescribed scatteredly in the existing legal system. However, the content of the registration of property has been specified in a wide range of legal normative documents at the level of a law, decree, circular guiding the implementation while the registration being the condition which creates the right to property or to create the effect against the third party (registered rights having the effect against the third party) and the registration of property being the recording of a legal event which creates, changes, limits or terminates the right to property of organizations, individuals by state authorities. For example:

- Article 95, Clause 3 Article 188 Land Law năm 2013;
- Clause 1 Article 118, Article 12 Law on Housing năm 2014;
- Clause 7 Article 3, Law on Forest Protection and Development 2004;
- Articles 28, 29 and 30, Law on Civil Aviation 2006 (amendment, supplement in 2014);
- Article 18, 19 and 36, Marine Code 2015 (taking effect as of July 01, 2017);
- Article 6, Law on Intellectual Property 2005 (amendment and supplement in 2009);
- Point c Clause 1 Article 10, Decree No. 163/2006/NĐ-CP dated 29/12/2006 of the Government on Secured Transactions (hereinafter called Decree No. 163/2006/NĐ-CP); Clause 1 Article 3 Decree No. 83/2010/NĐ-CP dated 23/7/2010 of the Government on the registration of secured transactions (hereinafter called Decree No. 83/2010/NĐ-CP);
- Circular No. 15/2014/TT-BCA dated 04/4/2014 on the registration of vehicles; Circular No. 37/2010/TT-BCA dated 12/10/2010 on procedures of the registration of vehicles...

Therefore, it is requested that ministries, agencies should further review, study to amend, supplement provisions on the registration of property to determine the time of transfer of the right in legal documents. More importantly, legal documents should include provisions specifying cases which required the registration and the power of registration... . Due to the lack of provisions on the registration which creates the effectiveness against the third party in the existing legal system, it is necessary to conduct study and to make and submit proposals to the NA for the promulgation of

the Law on the Registration of property.

### ***2.1.2. Regarding the transformation of sex***

Article 37 of the Civil Code 2015 provides for the transformation of sex, where sex transformation shall comply with regulations of law. Each surged transgender has the right and obligation to apply for change of civil status affairs as prescribed in law on civil status affairs and has the personal rights in conformity with the transformed gender as prescribed in this Code and relevant laws.

In addition, point e Clause 1 Article 28 of the Civil Code 2015 also includes the provision on the right to change the name of the transgender.

In order to ensure the implementation of the duty of the government, the Decision No. 243/QĐ-TTg dated 05/02/2016 of the PM on the issuance of the Plan on the Implementation of the Civil Code assigns the Ministry of Health to conduct studies, propose the formulation of legal normative documents on sex transformation.

At present, the Ministry of Health is drafting this Law. It is planned that the draft law is submitted to the NA in 2019-2020.

### **Recommendations:**

To ensure that sex transformation is materialized in practice, it is needed to develop, promulgate the Law on sex transformation in accordance with the law and ordinance formulation programme of the NA. In this Law, it is necessary to elaborate personal rights of the transgender to guarantee the rights of the transgender.

## **2.2. New provisions of the Civil Code 2015 which need to be amended and supplemented in related legal normative documents for the implementation**

### ***2.2.1. with regard to the scope of disputes which are selected to be settled by the application of the arbitration mechanism***

Clause 1, Art. 14 of the Civil Code prescribes: "If a particular civil right is violated or is under a dispute, the protection of such right shall be implemented as prescribed in procedural law at the court or arbitrator."

However, Art. 2 of the Law on Commercial Arbitration 2010 provides that arbitrators shall have the competence to handle the following disputes: "1. Disputes between parties arising from commercial activities; 2. Disputes arising between parties at least one of whom is engaged in commercial activities; 3. Other disputes between parties which the law stipulates shall [or may] be resolved by arbitration".

As such, according to the Civil Code 2015, the scope of disputes to be resolved by arbitration is more "open" compared to the approach specified in Art. 2 of the Commercial Law 2010.

### **Recommendations:**

It is necessary to amend, supplement the Commercial Law towards guaranteeing the right to make choices on the mode of protection of the civil rights of the subject by further clarifying the competence of the arbitrator and cases where arbitrators shall not have the competence to settle.



### ***2.2.2. Regarding limited cognition or behavior control***

In addition to the heritage of provisions on the lack of civil act capacity and limited civil act capacity, the Civil Code has added provisions on persons with difficulties in cognition and control of civil acts.

However, some existing legal normative documents are limited to providing for lacks of civil act capacity and limited civil act capacity on the basis of the elaboration of the provisions of the Civil Code 2005 while they fail to include provisions on persons having difficulties in cognition and control of acts, therefore, there are insufficient applicable grounds for the exercise and protection of the right of persons with difficulties in cognition and control of acts or in determination of the effect of transactions, the effect of the representation.

Examples:

- Clause 6 Article 157 of the Law on Housing 2014 provides that: the party authorized to manage the house is missing or decided by the court to be incapable of civil acts”.

- Clause 6, Clause 7 Article 36 of the Labour Code 2012 prescribes: “6. The employee dies, is declared dead, missing or incapable of civil acts by the Court; 7. The employer being an individual dies, is declared dead, missing or incapable of civil acts by the Court; the employer not being an individual stops the operation.

- Clause 3 Article 24, Law on Marriage and Family 2014 provides that: A spouse may represent the other when the latter loses his/her civil act capacity while the former is eligible to act as the guardian or when the latter has his/her civil act capacity restricted while the former is designated by a court to act as the at-law representative of his/her spouse, unless the latter is required by law to perform by himself/herself related rights and obligations.

When a spouse loses his/her civil act capacity and the other requests a court to settle divorce, the court shall designate another person to represent the partner who has lost his/her civil act capacity for settlement of divorce in accordance with the Civil Code’s provisions on guardianship.”

- Clause 3 Article 13, point b Clause 2 Article 15, Law on Notary 2014 prescribes: persons who loss or have limited civil act capacity”.

- Point a Clause 1 Article 35, point a Clause 1 Article 36, Law on Credit Organizations 2010 prescribes: “lacks of civil act capacity; limited civil act capacity”...

### **Recommendations:**

Amend, supplement or develop new legal normative documents guiding the application of the law on persons having difficulties in cognition and control of acts in specific civil relations.

### ***2.2.3. Regarding personal rights***

The Civil Code 2015 amends, supplements many provisions on personal

rights relating to civil status, determination of the entity status individuals in civil relations and specifies the mechanism to recognize, respect, exercise and protect rights. Particularly, the Civil Code 2015 provides for the rights: the right to names, the right to change family names, the right to change first names; the right to identify and re-identify the ethnicity; the right to declaration of birth and death; the right to nationality; the right to re-determine gender identity...

However, because some existing legal normative documents have been formulated on the basis of the elaboration of the Civil Code 2005, there has been no detailed guidance on new contents of the Civil Code 2015.

Examples:

- The Law on Child Adoption 2010 only prescribes that: “At the request of adoptive parents, competent state agencies shall decide on the change of the full names of adopted children. Change of the full names of an adopted child aged 9 or more years must be consented to by such child. (Clause 2 Article 24); “The adopted person has the right to restore his/her name as before adoption” (Clause 5 Article 27) while it fails to clearly prescribes in which cases people shall have the right to change their names or who shall have the right to restore the names of the adopted child when the adoption is terminated;

- Clause 3 Article 14 Decree No. 123/2015/NĐ-CP ngày 15/11/2015 of the Government Detailing, and providing measures to implement, the Law on Civil Status, Government specifies that *when registering the birth of abandoned child the lines for declaration on father, mother and ethnicity of the child in the birth certificate shall be left blank; in the civil status book clearly written “abandoned child”*.

- Clause 3 Article 24 of the Law on Child Adoption 2010 prescribes: “The nationality of an adopted abandoned child shall be determined according to the nationality of the adoptive parents. This provision is in conformity with the provision of the Civil Code 2015 on the determination of the nationality of the adopted child being abandoned child. However, for cases where the adopted child is an abandoned child, and then his/her natural parents are identified but there is no ground for the termination of the adoptive relation, guidance on whether it is required to re-identify the nationality of the adopted child...”

### **Recommendations:**

It is necessary to review, revise or promulgate new legal normative documents relating to the civil status area in order to ensure the consistency in civil status procedures applied to the rights to family, first names, nationality, re-determination of gender identity...

#### **2.2.4. Regarding legal entity**

##### *a) Classification of legal entities*

the Civil Code 2015 classifies legal entities based on the purpose of the establishment, operation of the legal entities which are classified into two groups: commercial legal entities and non-commercial legal entities; non-commercial legal entities include regulatory agencies, people's armed units, political organizations, socio-political organizations, political-socio-professional organizations, social

organizations, socio-professional organizations, social funds, charity funds, social enterprises and other non-commercial organizations.

However, existing legal normative documents have not clearly identified the legal status of socio-political organizations, political-socio-professional organizations, social organizations, socio-professional organizations. This has been creating difficulties for these organizations when participating in civil relations.

**Recommendations:**

It is necessary to promulgate specific regulations on the legal status of socio-political organizations, political-socio-professional organizations, social organizations, socio-professional organizations in related legal normative documents to create favorable conditions for them when participating in civil relations.

*b) Regarding the time when the civil legal capacity of a legal person*

Clause 2 Article 86 the Civil Code 2015 provides that " The civil legal capacity of a legal person arises at the time when a competent authority establishes or authorizes to establish; if a legal person is required to register of operation, its civil legal capacity shall arise from the time when its name is registered in a register book.

However, provisions of some existing legal normative documents are not consistent with the provisions of the Civil Code 2015 on the time when the civil legal capacity of a legal person. For example: according to Clause 2 Article 47, Clause 2 Article 73, Clause 2 Article 110, Clause 2 Article 172 of the Law on Enterprises 2014, one member limited liability companies, limited liability companies with two or more members [multi-member], shareholding companies, partnership companies shall have the legal status as of the date their enterprise registration certificates are granted.

**Recommendations:**

It is necessary to review, amend, supplement or promulgate new legal normative documents related to legal status to be consistent with the general principle on the time when the civil legal capacity of a legal person prescribed by the Civil Code 2015.

***2.2.5. Regarding the representation***

Article 136, Article 137, Article 138 the Civil Code 2015 amends, supplements provisions on legal representation and authorized representation towards:

- Revising provisions on legal representatives of a legal person including a) *The person appointed by the juridical person according to its charter; b) The person competent to represent as prescribed by law; c) The person appointed by a court during the proceedings at the court. (in replacement of the provision of the Civil Code 2005: Heads of legal persons as prescribed by the charters of the legal persons or decided by competent state agencies;*

*The provision specifying that representatives of households, co-operative groups or other organizations which do not have a legal status are authorized representatives is the replacement of the regulation of the Civil Code 2005: natural representatives*

*being “heads of households for households, heads of cooperative groups for cooperative groups”*

A legal person may have many legal representatives and a legal person may be the authorized representative for other individuals, legal persons.

However, some existing legal normative documents have been promulgated on the basis of the elaboration of the Civil Code 2005, they are not in consistency with the Civil Code 2015.

Examples:

- Clause 6 Article 4, Clause 2 Article 74, Clause 2 Article 120 of the Law on Credit Organizations provides that: a People Credit Fund is the credit fund established by legal persons, individuals and *households* on a voluntary basis in the form of a cooperative to implement some banking activities in accordance with this law and the Law on Cooperative with the main objective of supporting each other in production, business activities and in life.

Members of the people credit funds include individuals, *households* and other capital contributing legal persons.

A microfinance organization must maintain a percentage of the total outstanding loans delivered to individuals, *households* with low income, super small enterprises out of the total outstanding loans which is not lower than the percentage set by the State Bank”.

- Law on Housing 2014 and Decree No. 99/2015/NĐ-CP dated 20/10/2015 of the Government detailing and guiding the implementation of some articles of the Law on Housing specifies that “*households*” is the governing target of the Law and Decree and they are entitled to participate in buying, selling, leasing, donating, inheriting ...transactions but they fail to provide guidance on how households enter into contracts.

- Clause 3 Article 13 of the Law on Enterprises 2014 prescribes: If the enterprise has only one legal representative, such person must reside in Vietnam and must authorize in writing another person to exercise the rights and perform the obligations of the legal representative when the former exits Vietnam...” There has not any guidance on how to interpret the term “another person” whether it may be a legal person.

- Decree No. 151/2007/NĐ-CP dated 10/10/2007 of the Government on the organization and operations of cooperative groups, Circular No. 04/2008/TT-BKH dated 9/7/2008 of the MPI guiding some provisions of Decree No. 151/2007/NĐ-CP and many existing legal normative documents have been recognizing loan-taking groups founded on the basis of the cooperative group model.<sup>2</sup> These legal normative

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<sup>2</sup> Grounds for formation of loan taking group: Decree No. 41/2010/NĐ-CP of the government on credit policies aiming at agricultural and rural development; Inter-agency Resolution No. 02/NQLT-NHNN-HND dated 30/6/2010 jointly issued by the State Bank of Vietnam and Vietnam Farmers’ Association; Inter-sectoral Agreement No. 799/TTLN dated 19/10/2010 between Vietnam Farmers’ Association and Agribank of Vietnam;

documents have noted heads of cooperative groups as the representatives in transactions.

**Recommendations:**

Amending, supplementing, promulgating new legal normative documents to provide specific guidance on the representation of individuals, legal persons, households, cooperative groups, other non-legal persons towards ensuring the consistency with new provisions of the Civil Code 2015.

**2.2.6. Regarding the statute of limitations**

Regarding the application of the statute of limitations, the Civil Code 2015 provides that the court only applies provisions on the statute of limitation at the request of a party or the parties provided that such request is filed before the first trial court of first instance gives a judgment and/or a decision on settlement. The person benefiting from the application of the limitation period may refuse to apply such limitation period, unless such refusal is aimed at evading his/her obligations.

Regarding specific statute of limitations, the Civil Code 2015 specifies:

- The statute of limitation for requesting the Court to declare a civil transaction invalid for relatively invalid transactions (invalid transactions by minors, persons who lose their civil act capacity, persons having difficulties in cognition and control of their civil acts, persons with limited civil act capacity; invalid transactions due to misunderstanding, deception, threat or compulsion; invalid transactions established by persons who are incapable of cognition and control of their acts; invalid transactions due to non-compliance to regulations on forms of transactions). In these cases, after two years, if there is no request for declaring a transaction invalid, such transaction shall be determined valid. For invalid civil transactions due to violations legal prohibitions or contravention of social ethics or falsification, the statute of limitation for requesting the court to declare a transaction invalid shall not be limited.

- The statute of limitations for initiating a lawsuit to request the court to settle contract disputes and the statute of limitations for initiating a lawsuit to request for compensation for damages is 3 years counting from the date when the person with the right to request know or should have known that their rights and legitimate interests are infringed upon.

- The limitation period with respect to a claim of an heir for distribution of an estate shall be thirty years regarding immovable property or ten years regarding movable property from the time of commencement of the inheritance. Upon the expiry date of the aforesaid period, the estate shall belong to the estate administrator. In case where there is no estate administrator, the estate shall be dealt with as follows:

The limitation period with respect to a claim of an heir for distribution of an estate shall be thirty years regarding immovable property or ten years regarding movable property from the time of commencement of the inheritance. The limitation

period with respect to a claim of an heir for a declaration of right of inheritance of the requester or to disallow the claim to inheritance of another shall be ten years from the time of commencement of the inheritance. The limitation period with respect to a claim for an heir to fulfill property obligations of the deceased shall be three years from the time of commencement of the inheritance.

To ensure the consistency with provisions of the Civil Code 2015 on the statute of limitations, Article 184 and Article 185 of the Civil Procedure Code 2015 was formulated towards being consistent with the provisions of the Civil Code on the statute of limitations to be applied in civil procedures.

However, some existing legal normative documents are not in consistent with the Civil Code 2015 on the way to define the statute of limitations.

Examples: of the Law on Insurance Business provides that: the statute of limitations to initiate a lawsuit on insurance contract is 3 years, *counting from the date when the dispute arises*”;

- Article 5 of the Law on State Compensation Liabilities 2010 specifies: the statute of limitations to request a compensation is 2 years from the date the document determining the illegal act of the person delivering the public service become available.

### **Recommendations:**

Amending, supplementing related legislations towards excluding specific provisions of related legislation on the statute of limitations in order to apply the provisions on the statute of limitations of the Civil Code 2015 in a consistent manner; if related laws include provisions on the statute of limitations, it is necessary to ensure that the way to calculate the statute of limitations is consistent with that of the Civil Code 2015.

### **2.2.7. Regarding forms of ownership**

The Civil Code 2015 recognizes there are 3 forms of ownership in civil relations including: the people’s ownership, private ownership and multiple ownership (in addition, the Civil Code 2015 consistently uses the term “belong to the State”).

However, some existing legal normative documents have been promulgated on the basis of provisions of the Constitution 1992 and the Civil Code 2005, therefore, they are not consistent with the Civil Code 2015.

Examples:

The Law on management and use of state assets 2008 and the Law on management and use of state capital investments in production, business activities of enterprises 2014 use an approach which generally sees the people-owned assets as the state assets;

- Decree No. 29/2014/NĐ-CP dated 10/4/2014 of the Government prescribing the competence, procedures for the establishment of state ownership of property and for management and handling of property over which state ownership is established specifies “state ownership is established...”

**Recommendations:**

It is necessary to amend, supplement or promulgate new legal normative documents relating to the people’s ownership in conformity with the provision of the Civil Code 2015.

**2.2.8. Right to adjoining immovable property**

Article 246 of the 2015 Civil Code provides that: "The right to adjoining immovable property shall be established according to natural terrain, as prescribed by law, according to agreement or will". Furthermore, in the 2015 Civil Code, this right is based on the spirit of a common passageway (the relationship between two adjoining immovable properties). At the same time, the 2015 Civil Code does not require that two properties use each other; for example, for the safety of an airport, an adjoining immovable property must be influenced or restricted in terms of architecture or height ...

However, some current LNDs, which were issued in accordance with the 2005 Civil Code, are not conformable with spirit of the 2015 Civil Code in terms of adjoining immovable property. For instance:

- Article 171 of the 2013 Land Law just provides for the limited use rights to the adjacent land parcel. Therefore, there should be more detailed guidance on this provision to align with the 2015 Civil Code;

- Article 47.3 of the 2014 Construction Law requires that, "A construction planning permit must cover the scope and size of the planning area, the permitted construction-planned land use quota, the requirements on land exploitation and use, organization of architectural space, ground and underground technical and social infrastructures, landscape and environment protection in the project area, and its validity duration". This provision is also in need of detailed guidance in order to be consistent with the 2015 Civil Code...

**Recommendations:**

It is recommended to amend, supplement or issue new LNDs (Land Law, Housing Law, Law on Real estate trading, Construction Law, Law on Planning...) to align with the new approach of the 2015 Civil Code on adjoining immovable property.

**2.2.9. Usufruct right**

The 2015 Civil Code now includes usufruct right which shall be established as prescribed by law, according to agreement or will, but the rights and obligations of the usufructary or owner are exercised in accordance with provisions of the Civil Code (not according to agreement) without limiting property which is the subject of usufruct right. As such, the subject of usufruct right may be property which is the subject of intellectual property right, land use right, shares, stocks ... Meanwhile, other relevant laws have not yet governed this matter in detail.

### **Recommendations:**

It is advised to specify usufruct right in particular civil relations in relevant LNDs, such as specifying the subjects of usufruct right being shares, stocks, etc. in the laws on enterprises, investment, stocks...

#### **2.2.10. Surface rights**

Under the 2015 Civil Code, a holder of land use rights may transfer his right over ground and water surface to another entity. In this case, the holder of surface rights has the rights and obligations stipulated in the Civil Code, meaning that he/she has the right to exploit and use ground, water surface, space thereon, the water and the earth bowel of the land whose land use rights belong to another entity for construction, planting or cultivation provided that it is not contrary to the provisions of this Code, the law on land, construction, planning, resources, minerals and other provisions of relevant laws; has the ownership rights to every property derived; if part of the whole of surface rights is transferred, the transferee shall inherit the surface rights according to conditions and within the scope in proportion to the part or the whole transferred surface rights.

Example 1: Mr. A has the right to use a land parcel of 500 m<sup>2</sup>. Instead of signing a lease contract with Mr. B (as specified in the Land Law), Mr. A and Mr. B reached an agreement that allows Mr. A to transfer the surface right to Mr. B with all associated rights and obligations stipulated in the Civil Code for 50 years, in accordance with the land use purposes and land use terms prescribed in the Land Law. After having the surface right, Mr. B built an apartment building for sale of individual apartments to other entities. In principle, under the 2015 Civil Code, those entities are entitled to own their apartments bought from Mr. B according to conditions and within the scope in proportion to the surface rights transferred by Mr. A to Mr. B.

Example 2: A competent state agency allowed Mr. X to invest in an agricultural project in an area of 300 ha (whose agricultural land use rights belong lawfully to 500 households). In this case, under the 2015 Civil Code, instead of the state recovering land from those 500 households to give to Mr. X, or Mr. X signing lease contract of land use rights with 500 households, it is possible for the 500 households to transfer their surface rights to Mr. X for use within the investment project duration, and be paid for surface rights, or contribute land use rights as capital to Mr. X's project. Upon expiry of investment duration, Mr. X must return the ground, water surface, space thereon and earth bowel of the land to the 500 households, and take care of the property under his ownership.

### **Recommendations:**

This is a new and very important approach which closely relates to the laws on land, housing, construction, planning. Therefore, this approach should be specified in those LNDs to ensure both the right and interests of land users and entities having surface rights, and principles of the Constitutions and Land Law that land belongs to the entire people with the State uniformly managing land; at the same time assuring social order and stability in related relations. It is essential to keep the relation in contracts and the relation in surface rights separated.



### **2.2.11. Security for performance of obligations**

#### *a) Types of security for performance of obligations and registration of security*

Article 292 of the 2015 Civil Code stipulates 9 types of security for performance of obligations, including: pledge of property, mortgage of property, deposit, security collateral, escrow deposit, title retention, guarantee, fidelity guarantees, and lien on property.

Article 331 of the 2015 Civil Code prescribes that: "The title retention shall take effect against third party from the time of registration".

However, Decree no. 163/2006/NĐ-CP and Decree no. 11/2012/NĐ-CP dated February 22, 2012 of the Government amending some articles of Decree 163/2006/NĐ-CP dated December 29, 2006 (hereafter referred to as Decree no. 11/2012/NĐ-CP) do not have any provision on title retention and lien on property as types of security.

Decree no. 83/2010/NĐ-CP has not prescribed registration of title retention.

#### **Recommendations:**

Decree no. 163/2006/NĐ-CP should be amended and supplemented to make detailed provisions for the two new types of security, namely title retention and lien on property; Decree no. 83/2010/NĐ-CP and the guiding circulars should also be amended so as to add new provisions on registration of title retention.

#### *b) Collateral*

Article 295.2 of the 2015 Civil Code provides that collateral may be described generally but must be identified.

However, Article 1.2 of Decree no. 11/2012/NĐ-CP does not touch upon this matter.

In addition, the 2015 Civil Code allows the use of property rights to secure the performance of obligations. However, Decree no. 163/2006/NĐ-CP and Decree no. 11/2012/NĐ-CP only make provisions for some legal matters related to mortgage of the right to claim debts, land use rights. There are no detailed guidance for property rights to subjects of intellectual property rights and other property rights (such as property right to capital contribution in an enterprise, property rights derived from contracts, right to exploit natural resources ...).

#### **Recommendations:**

Decree no. 11/2012/NĐ-CP should be amended to stipulate that security assets are existing assets or future assets; security assets may be described generally but must be identified. There should be added guidance on property rights which are used to secure the performance of civil obligations, and measures to realize such property rights.

#### *c) Effectiveness against third parties*

Article 297.1 of the 2015 Civil Code prescribes that security shall take effect against a third party from the time of registration of such security or the secured party keeps or possess the collateral.

However, Article 11.1 of Decree no. 163/2006/NĐ-CP stipulates that, “A security transaction shall be legally valid for a third party as from the time it is registered”.

In addition, Decree no. 163/2006/NĐ-CP and Decree no. 11/2012/NĐ-CP were based on the 2005 Civil Code so there have been no detailed guidance for keeping and possessing the collateral. For example, for some particular asset such as stocks, if the secured party does not keep or manage such asset directly but delegates authority to another person to manage the asset, then will the secured party be considered as keeping the asset? ...

**Recommendations:**

It is proposed to amend and supplement Decree no. 163/2006/NĐ-CP and Decree no. 11/2012/NĐ-CP to align with the new approach introduced in the 2015 Civil Code concerning the circumstances giving rise to the effectiveness of security against third parties.

*d) Registration of security*

Article 298 of the 2015 Civil Code prescribes that the subject of registration is security.

However, Decree no. 83/2010/NĐ-CP and Decree no. 163/2006/NĐ-CP on secured transactions stipulate that the subject of registration is “secured transactions” meaning civil transactions to agree on security.

Furthermore, the legal consequences of registration of security provided for in Decree no. 163/2006/NĐ-CP are different from that stipulated in the 2015 Civil Code. Under the 2015 Civil Code, registration shall give rise to effectiveness against a third party. Thereby, registration of security is useful for determining the order of priority for payment between joint secured parties when an asset is used to secure the performance of many obligations; it is not a condition for a secured transaction to be legally effective against a third party. However, according to Decree no. 163/2006/NĐ-CP, registration shall give rise to legal validity for a third party.

**Recommendations:**

Decree no. 83/2010/NĐ-CP and Decree no. 163/2006/NĐ-CP should be amended and supplemented to ensure consistency with the approach introduced in the 2015 Civil Code regarding the subjects of registration and legal validity of the registration of security.

*dd) Methods of realizing collateral*

Article 303.1 of the 2015 Civil Code stipulates that sale of collateral by the secured party itself is one method of realizing collateral.

However, Article 59 of Decree no. 163/2006/NĐ-CP has no provision on this method.

**Recommendations:**

It is recommended to revise Decree no. 163/2006/NĐ-CP by adding detailed guidance for the method of selling collateral by the secured party itself.

*e) Order of priority for payment between joint secured parties*

According to Article 308.1 of the 2015 Civil Code, payment priority order between the joint secured parties is determined according to the order of effect against the third party of the security (registering or keeping or establishing security in case where security does not take effect against the third party).

However, under Article 6 of Decree no. 163/2006/NĐ-CP, payment priority order between the joint secured parties is determined according to the criteria of registration (not including the keeping of asset) and establishment of a secured transaction (in case where the secured transaction is not registered).

**Recommendations:**

It is suggested to revise Decree no. 163/2006/NĐ-CP so as to provide that the payment priority order between joint secured parties is determined according to the order of effect against the third party of the security (registering, keeping or possessing the collateral, or establishing the types of security in case where the security does not take effect against the third party).

Under Article 342 of the 2015 Civil Code, the creditor is not entitled to realize the property but only to request the guarantor to pay the value of the breached obligation and compensate for any damage.

However, Article 1.14 of Decree no. 11/2012/NĐ-CP does prescribe the payment priority order for the proceeds from the handling of the guarantee's pledged or mortgaged assets.

**Recommendations:**

It is advised to remove clause 14 of Article 1 in Decree no. 11/2012/NĐ-CP.

*g) Effectiveness of pledge of property*

Article 310.1 of the 2015 Civil Code stipulates: “Agreement on pledge of property shall take effect from the time of concluding, unless otherwise agreed or prescribed by law”.

However, Article 10.1(b) of Decree no. 163/2006/NĐ-CP prescribes: “The asset pledge takes effect as from the time the asset is transferred to the pledgee”.

**Recommendations:**

Article 10.1(b) of Decree no. 163/2006/NĐ-CP should be amended to reflect the new spirit of the 2015 Civil Code.

*h) Mortgage property on land without mortgage on land use rights*

Article 326 of the 2015 Civil Code provides for the case of mortgage of property on land without mortgage on land use rights (the land user is also the owner of the property on land), and the case of mortgage of property on land only without mortgage on land use rights (the land user is not also the owner of the property on land).

However, Article 1.19 of Decree no. 11/2012/NĐ-CP does not yet provide for the handling of security assets/collateral in the case of mortgage of property on land only without mortgage on land use rights, and the land user is also the owner of the

property on land.

**Recommendations:**

Decree no. 11/2012/NĐ-CP should be revised to include guidance on the handling of collateral security in case of mortgage of property on land only without mortgage on land use rights, and the land user is also the owner of the property on land.

***2.2.12. Termination of civil obligations***

Article 372 of the 2015 Civil Code provides the grounds for termination of civil obligations, including the case where the obligee and the obligor merge; and where a distinctive object which is the subject matter of the civil obligation no longer exists and is substituted by another civil obligation.

However, Article 50 of the 2008 Law on Civil judgment enforcement, and Article 1.23 of the revised 2014 Law on Civil judgment enforcement, have not yet stipulated these two grounds.

**Recommendations:**

The Law on Civil judgment enforcement should be revise to include a provision that permit termination of judgment enforcement when the obligee and the obligor merge; and if the asset for judgment enforcement is changed in case a distinctive object which is the subject matter of the civil obligation no longer exists and is substituted by another civil obligation, judgment enforcement shall continue with the new asset.

***2.2.13. Levels of fines against violations and the relation between fine for violations and compensation for damage***

Under Article 418.3 of the 2015 Civil Code, in case the parties have an agreement on fines against violation which does not specify that the violating party has to pay both a find for violations and a compensation for damage, then the violating party has to pay only the fine for violations.

However, Article 307.2 of the 2005 of the Commercial Law specifies that: "Where the parties agree upon fines for breaches, the aggrieved party shall be entitled to apply both remedies of fines and damages, unless otherwise provided for by this Law".

**Recommendations:**

The Commercial Law should be amended to conform to the 2015 Civil Code in terms of the relation between remedies of fines and damages, by prescribing that if the parties only have an agreement which requires the violating party to pay a find for violations without a compensation for damage, then the mutual intentions of the entities in the contract must be respected.

***2.2.14. Interest in relation to the payment obligation***

Article 357 of the 2015 Civil Code prescribes:

"1. Where the obligor makes late payment, then it must pay interest on the unpaid amount corresponding to the late period.

2. Interest arising from late payments shall be determined by agreement of the parties, but may not exceed the interest rate specified in paragraph 1 of Article 468 of this Code; if there no agreement mentioned above, the Clause 2 of Article 468 of this Code shall apply".

As such, the Civil Code does not require the application of basic interest rate announced by the State Bank.

However, some current LNDs do require the application of basic interest rate announced by the State Bank. For instance, Article 11.3(d) of Decree no. 167/2013/NĐ-CP dated November 12, 2013 of the Government regulating the sanction of administrative violation in social security, order and safety, prevention and fighting of social evils, fire and domestic violence require a fine for "making a loan with mortgage but the interest rate exceeds *150% of basic interest rate announced by the State Bank of Vietnam* at the time of loan"...

### **Recommendations:**

It is suggested to amend, supplement or issue new LNDs to reflect the new approach introduced in the 2015 Civil Code to application of interest.

#### **2.2.15. Standard form contracts, general trading conditions in concluding contracts**

Under the 2015 Civil Code, the standard form contract must be public in order for the parties to know or should know the contents of the contract. Procedures for announcement of standard form contract shall comply with regulations of law. At the same time, the 2015 Civil Code also prescribes the general trading conditions in concluding contracts, to be understood as stable terms announced by a party to apply to the offeree; if the offeree accepts the contract is then deemed to accept these terms; general trading conditions shall be effective only with the parties as long as these conditions have been publicized in order for the parties to know or should know them; the procedures for announcement of general trading conditions shall comply with regulations of law; the general trading conditions must ensure equality between the parties. If the general trading conditions contain provisions on discharge of liability from the party giving the general trading conditions, increase of responsibility or removal of the legitimate interests of the other party, these provisions do not take effect, unless otherwise agreed.

However, presently, only the law on protection of consumer rights has provisions on general trading conditions (Articles 3.6, 12, 16, 18, 26, 38 and 48 of the 2010 Law on Protection of Consumer rights).

In addition, some current LNDs are not consistent with provisions of the 2015 Civil Code. For example, Article 2.2 of Decision no. 35/2015/QĐ-TTg dated August 20, 2015 of the Prime Minister, on amending to Decision no. 02/2012/QĐ-TTg dated January 13, 2012 by the Prime Minister on promulgation of essential goods and services for which standard form contract and general trading conditions must be registered, stipulates that for the issuance of inland debit cards, opening and use of payment account service (applicable to individual customers), individual borrow service (for consumption purpose), it is required to register contract forms and general trading conditions. This provision is not in line with the 2015 Civil Code,

because the 2015 Civil Code only requires the announcement of standard form contracts and general trading conditions, not the registration of such. The addition of these services to the list of essential goods and services, for which standard form contracts and general trading conditions must be registered, may not be necessary as it creates more administrative procedures for credit institutions and may increase the costs borne by consumers.

**Recommendations:**

It is advised to amend, supplement or issue new LNDs to reflect the provisions of the 2015 Civil Code on standard form contracts and general trading conditions in concluding contracts.

**2.2.16. Cooperation contracts**

The 2015 Civil Code includes provisions on cooperation contracts in order to create the legal basis for uniformly governing the relationship between parties in production and business cooperation, especially the relationship among members of co-operative groups. Apart from the new approach to co-operative groups, the 2015 Civil Code also prescribes that the entities forming cooperation contracts include national and legal persons, and that any member of a co-operative group can represent in civil transactions without requiring the cooperation contract to be authenticated ...

**Recommendations:**

There should be a new Decree on cooperation contracts replacing Decree no. 151/2007/NĐ-CP dated October 10, 2007 of the Government on the organization and operation of co-operative groups and Circular no. 04/2008/TT-BKH of the Ministry of Planning and Investment guiding some articles of Decree no. 151/2007/NĐ-CP.<sup>3</sup>

**2.2.17. Liability for compensation for non-contractual damages**

Under Article 584.1 of the 2015 Civil Code, the grounds giving rise to liability to compensate for damage are based on the presumption of faults, whereby any person harming the life, health, honor, dignity, reputation, property, or other legal rights or interests of a person, must compensate for such damage, unless otherwise prescribed in the Civil Code or relevant laws.

As such, the claimant just need to prove the actual damage, which is caused by the person being requested to compensate.

However, some current LNDs were issued in accordance with the 2005 Civil Code so they are no longer aligned with the 2015 Civil Code.

For example:

- Article 53.1 of the Law on Insurance business which says, “The insurance enterprises’ responsibility shall arise only if the third party requests the insured to pay compensations for damage caused to the third party during the insurance time *by such persons who are at fault*”, is not consistent with the 2015 Civil Code;

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<sup>3</sup> Currently, the Ministry of Planning and Investment is developing the draft Decree on cooperation contracts, and the Drafting board and Editing team have been established for this purpose.

- Articles 35.6, 36.4, 40.4, 66.2(h), 76.2(g) of the 2005 Law on Tourism stipulate that:

+ Tourists have the right "to be compensated for the damage *caused by the fault of organizations or individuals doing tourism business* in accordance with the provisions of law", and must "compensate for the damage *caused by their fault* to organizations and individuals doing tourism business";

+ Organizations or individuals doing tourism business must "compensate for losses which they have *caused by their fault* to tourists".

+ Organizations, individuals doing tourist accommodation business must "compensate tourists for losses *caused by their fault*".

+ Tourist guides have the obligation to "compensate for losses *caused by their fault* to tourists and travel enterprises"...

**Recommendations:**

LNDs related to compensation for non-contractual damages must be amended and supplemented to align with new provisions of the 2015 Civil Code.

**2.2.18. Joint will of husband and wife**

The 2015 Civil Code neither provides for joint will of husband and wife nor prohibits the making of such. Instead, it applies a general principle for wills in order to determine the effect of joint will of husband and wife. Accordingly, in case of a joint will between the husband and wife, this will is not invalid if it satisfies the conditions for lawful wills and formalities of wills specified in the Civil Code. Regarding legal effect of wills, in case the husband and wife make a joint will and one of them dies prior to the death of the other, then his or her part of will shall become legally effective from the time of commencement of the inheritance – meaning at the time of the death of that person.

**Recommendations:**

In order to be consistent in the application of laws and rights and interests of individuals in making wills, the Ministry of Justice should have guiding documents for notarization and authentication of joint will of husband and wife in this case.

**2.2.19. Applied law to civil relations involving foreign elements**

*a) The concept of civil relations involving foreign elements*

Article 663 of the 2015 Civil Code defines as follows: Civil relation involving a foreign element means any of the following civil relations: (i) There is at least one of the participating parties being a foreign natural person or juridical person; (ii) The participating parties are Vietnamese natural persons or juridical persons but the basis for the establishment, modification or termination of such relation arose in a foreign country; (iii) The participating parties are Vietnamese natural persons or juridical persons but the subject matter of such civil relation is located in a foreign country.

However, some current LNDs are not yet consistent with the 2015 Civil Code.

For example:

- Article 3.25 of the 2014 Law on Marriage and Family; Articles 3 and 28 of the

2010 Law on Adoption see overseas Vietnamese as a separate group of entities in civil relations involving foreign elements.

- Article 3.3(d) of Decree no. 37/2015/NĐ-CP dated April 22, 2015 of the Government making detailed provisions on construction contracts stipulates that, “Foreign construction contract is a type of contract signed between a foreign contractor and a domestic contractor or investor”...

**Recommendations:**

It is recommended to revise or adopt new LNDs in order to ensure consistency with the 2015 Civil Code. In case where adoption of children involving foreign elements is based on the residing elements of relevant parties according to international treaties (such as the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption), it is necessary to have a uniform definition for “permanent residing address” and not to use the term “place of settlement” as the case at present.

*b) Location of contradicting legal norms*

Article 664 of the 2015 Civil Code prescribes that “The international agreements to which the Socialist Republic of Vietnam is a signatory or Vietnamese law shall apply to civil relations involving foreign elements”.

**Recommendations:**

It is recommended to amend relevant laws such as Law on Enterprises, Construction Law, Investment Law ... in order to fix the contradicting provisions in these documents as well as in other sub-law LNDs.

*c) Application of international customary practices*

Under Article 666 of the 2015 Civil Code, international customary practices may be applied if the consequences of such application is not contrary to the basic principles of Vietnam’s laws.

However, some current LNDs are not yet consistent with the 2015 Civil Code in this respect. For example, the 2006 Law on Technology transfer, 2005 Commercial Law, 2000 Law on Insurance business (amended and supplemented in 2010); 2014 Investment Law; and 2010 Law on Commercial arbitration provide that international customary practices may be applied if such practices are not contrary to the basic principles of Vietnam’s laws.

**Recommendations:**

It is proposed to revise or promulgate new LNDs to align with provisions of the 2015 Civil Code.

*d) Non-application of foreign laws*

According to Article 670 of the 2015 Civil Code, the foreign law, notwithstanding being referred to, shall not apply in the case where “the consequences of its application are inconsistent with the fundamental principles of the law of the Socialist Republic of Vietnam”.

However, some current LNDs are inconsistent with the 2015 Civil Code. For



example, the 2006 Law on Technology transfer; 2014 Investment Law; 2014 Law on Marriage and Family; 2005 Commercial Law; and Decree no. 15/2015/NĐ-CP dated February 14, 2015 of the Government on investment in the form of public-private partnership allow the application of foreign law if such law is not contrary to the fundamental principles of the law of Vietnam or to the law of Vietnam.

**Recommendations:**

It is proposed to amend or promulgate new LNDs to align with provisions of the 2015 Civil Code.

*dd) Applied law for contracts*

- Article 683 of the 2015 Civil Code prescribes that the applied law for contracts (agreed by the parties; if the contracting parties fail to agree the applied law, the law of the country with which such contract closely associates shall apply) is also applied to form of contracts, and “in case where the form of a contract does not comply with the form of the law applied to such contract but it comply with the form of the law of the country where the contract is entered into or the law of Vietnam, such form of contract shall be recognized in Vietnam”.

- Article 683.4 of the 2015 Civil Code stipulates: “If the object of a contract is an immovable property, the law applied to transfer of its ownership rights and/or other property-related rights, lease of immovable property or using the immovable property as the guarantee for performance of obligations shall be the law of the country where the immovable property is located”.

However, some LNDs in force are inconsistent with the 2015 Civil Code. For example, Article 11 of Decree no. 37/2015/NĐ-CP dated April 22, 2015 of the Government regulating construction contracts provides that “The construction contract must conform to the law system of the Socialist Republic of Vietnam and provisions set out hereof.” ...

**Recommendations:**

It is proposed to amend or promulgate new LNDs to align with provisions of the 2015 Civil Code by: (i) expanding on the applied law to form of contracts in order to avoid cases of contracts becoming invalid because of form; (ii) allowing parties to apply foreign law.

**3. PROVISIONS TO BE GUIDED BY THE SUPREME PEOPLE’S COURT TO ENSURE CONSISTENCY IN THE HANDLING OF CIVIL CASES**

**3.1. Refusal of courts to settle civil matters or cases on grounds of having no provision of law to apply**

Article 14.2 of the 2015 Civil Code prescribes that each court may not refuse to settle a civil matter or case with the reason that there is no provision of law to apply. In this case, if there are no practices and the application of analogy of law is unavailable, courts are entitled to apply basic rules of civil law provisions, precedents and the justice to settle civil cases.

Together with the 2015 Civil Code, the 2015 Civil Procedure Code continues to confirm the following principle: "Courts must not refuse to settle a civil case for the

reason that there is no applicable law provision for such case" (Article 4.2). The 2015 Civil Procedure Code also clarifies the term "a civil case without applicable law provisions", rules for resolving civil cases without law provisions to apply (Article 45), ways to make decisions, first instance and appellate civil judgments in case of applying other sources of law to settle the cases (Articles 264, 266, 313).

### **Recommendations:**

For the courts to play the role of safeguarding justice in the absence of law provisions, protecting in a timely manner human rights, citizen rights, as well as protecting the rights and legitimate interests of individuals and legal persons in civil matters, the Supreme People's Court should give guidance on the handling of a specific civil relationship when there are no provisions to apply. With regard to legal tools to address civil cases, the Justice Council of the Supreme People's Court has issued Resolution no. 03/2015/NQ-HĐTP on October 28, 2015 on the process for selecting, announcing and applying precedents. However, the Justice Council of the Supreme People's Court should also provide specific guidance for the application of customary practices, analogy of law, basic rules, and justice in order to ensure consistency in the application and resolution of civil cases and matters in the entire court system, as well as consistency in the awareness of agencies, organizations and individuals in the handling of civil cases and matters.

### **3.2. Other issues**

For uniform implementation of the 2015 Civil Code and consistent handling of civil cases and matters, the Supreme People's Court should collaborate with the Supreme People's Procuracy, Ministry of Justice and relevant ministries and sectors in providing guidance for provisions of the 2015 Civil Code, or setting precedents for the following matters:

- Cancellation of isolated unlawful decisions of competent agencies, organizations or persons (Article 15);
- Persons with limited cognition or behavior control (Article 23);
- Rights of an individual with respect to his/her image (Article 32); Right to life, right to safety of life, health and body (Article 33); Right to protection of honor, dignity and prestige (Article 34); Right to private life, personal secrets and family secrets (Article 38)...;
- Guardians, supervision of guardianship (Articles 51, 54, 57, 58, 59...);
- Households (Article 101 through Article 104);
- Representatives of natural/legal persons;
- Statute of limitations;
- Civil transactions, especially related to invalidity of form, protection of bona fide third parties;
- Application of summary procedure in the handling of collateral/security assets in the case where a contract has been notarized or registered according to law, and the parties have admitted their obligations, but there is a dispute over non-delivery of assets;

- Implementation of contracts when the circumstances have changed considerably, cancellation of contracts, unilateral termination of contracts, conclusion of contracts, fines for violations, damage to be compensated in contracts ...;
- Grounds for compensation for non-contractual damage, new cases of compensation;
- Inheritance (time limits, interpretation of wills, lost wills, gifting...)
- Applied law to civil relationships involving foreign elements.